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The Supreme Court's Worst Decision in Recent Years – Garcetti v. Ceballos, the Dred Scott Decision for Public Employees

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THE SUPREME COURT'S WORST DECISION IN RECENT YEARS – *GARCETTI V. CEBALLOS*, THE DRED SCOTT DECISION FOR PUBLIC EMPLOYEES

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> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate them from discipline.
>
> - Justice Anthony Kennedy in *Garcetti v. Ceballos*.[1]

> The American people are the only ones who lose if government employees are silenced, because only a corrupt government gains from that, and the five Justices who took an oath to protect the Constitution of the United

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[1] 547 U.S. 410, 421 (2006).

> States for the citizens of the country were the ones who were now violating their oath.
>
> - Michale Callahan.[2]

I. INTRODUCTION

The United States Supreme Court has had its share of shameful rulings.[3] The great Erwin Chemerinsky wrote that we should "appreciate the powerful case against the Supreme Court for the choices it has made throughout history."[4] Another scholar wrote that the "list is so long, so infamous, and so disturbingly regular—recurring consistently over time—that one must seriously question whether the Supreme Court has been, on balance, a positive or negative force in our nation's constitutional history."[5]

Many of these horrible rulings are well known. For example, the Court permitted slavery with its wretched decision in *Dred Scott v. Sandford*,[6] legalized segregation in *Plessy v. Ferguson*,[7] and supported the internment of 110,000 Japanese-American citizens in *Korematsu v. United States*.[8] These three decisions reek of abject racism and have been condemned in the annals of history.[9]

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[2] MICHALE CALLAHAN, TOO POLITICALLY SENSITIVE 351 (2009).

[3] JOEL D. JOSEPH, BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT 21 (1990).

[4] ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 342 (2015).

[5] Michael S. Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003).

[6] 60 U.S. 393 (1857); *see* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 106 (1993) (calling the *Dred Scott* decision a "judicial blunder").

[7] 163 U.S. 537 (1896); *see also* CHEMERINSKY, *supra* note 4, at 35 ("The most important such case was *Plessy v. Ferguson*, in 1896. It, too, is widely regarded as one of the Supreme Court's worst decisions.").

[8] 323 U.S. 214 (1944); *see also* CHEMERINSKY, *supra* note 4, at 57 ("*Korematsu* is deeply objectionable because the government used ethnicity alone as the basis for predicting who was a threat to national security and who would remain free.").

[9] Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 797 (2006) ("For most of U.S. history the Supreme Court has supported and reinforced racial discrimination against non-whites."); *see also* Maureen Johnson, *Separate But (Un)Equal: Why Institutionalized Anti-Racism is Never the Answer to the Never-ending Cycle of* Plessy v. Ferguson, 52 U. RICH. L. REV. 327, 327 (2018) ("For decades, *Plessy v. Ferguson* has been identified as one of the worst decisions ever handed down by the Supreme Court."); Austin Allen, *Rethinking* Dred Scott*: New Context for an Old Case*, 82 CHI. KENT L. REV. 141, 141 (2007) ("Almost everyone despises *Dred Scott*."); Corinna Barrett Lain, *Three Supreme Court "Failures" and a Story of Success*, 69 VAND. L. REV. 1019, 1020 (2018) (listing *Plessy* and *Korematsu*—along with *Buck v. Bell*, 274 U.S. 200 (1927)—as three of the Court's worst decisions).

However, another decision of a more recent vintage deserves its rightful place in the Court's hall of shame: *Garcetti v. Ceballos*.[10] In *Garcetti,* the Court issued a decision that serves as a *Dred Scott*-type ruling for public employees, diminishing their free speech rights to an unacceptable level. The Court created a categorical rule that public employees have no free speech rights when engaged in official, job-related speech.[11]

Under *Garcetti*, it does not matter how valuable an employee's speech is, how much corruption that speech exposes, or whether the speech informs the public regarding an important issue. Instead, the five-justice majority focused solely on creating a bright-line rule eviscerating the free speech rights of employees. The decision led to a "sea change in public employee First Amendment jurisprudence."[12] It also led to a terrible phenomenon of eponymous infamy, as plaintiff's attorneys commonly refer to their public employee clients who have been "Garcettized."[13] Today, the *Garcetti* decision continues to wreak havoc on countless public employees across the country.[14]

Part II of this essay briefly discusses the pre-*Garcetti* landscape of public-employee-related First Amendment jurisprudence, with a focus on the Court's, now defunct, balancing test for addressing such complaints, followed by a discussion of *Garcetti* and its multiple dissents. Part III addresses several lower court decisions illustrating how *Garcetti* has led to unfair results and unnecessarily diminished the free speech rights of police officers, firefighters, public school teachers, and other public employees. Finally, part IV discusses two slight retreats from the broad categorical rule created in *Garcetti*. These retrenchments are important, but better still would be the abrogation of *Garcetti* itself.

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[10] 547 U.S. 410 (2006).

[11] *Id.* at 421.

[12] David L. Hudson, Jr., *Commentary: Public-Employee Speech and the* Garcetti *Effect*, GETLEGAL (Sept. 28, 2009), https://www.getlegal.com/legal-info-center/commentary-public-employee-speech-and-the-garcetti-effect/ [https://perma.cc/HR7P-UXHZ].

[13] David L. Hudson, Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, ABA JOURNAL (May 1, 2017, 4:10 AM), http://www.abajournal.com/magazine/article/public_employees_private_speech [https://perma.cc/85PC-WE8S]; *see also* David L. Hudson, Jr., *Garcettized! '06 Ruling Still Zapping Speech*, FREEDOM F. INST. (Jan. 15, 2010), https://www.freedomforuminstitute.org/2010/01/15/garcettized-06-ruling-still-zapping-speech/ [https://perma.cc/DA2F-KG9A].

[14] David L. Hudson, Jr., *No Free Speech for You*, SLATE (Aug. 4, 2017), https://slate.com/news-and-politics/2017/08/anthony-kennedy-has-the-chance-to-undo-his-worst-first-amendment-decision.html [https://perma.cc/PR44-JS6Q]; David L. Hudson, Jr., *Another Public Employee 'Garcettized' in Chicago Cop Case*, FREE SPEECH CTR. (May 12, 2018), https://www.mtsu.edu/first-amendment/post/126/another-public-employee-garcettized-in-chicago-cop-case [https://perma.cc/W7HB-7LHD].

II. *GARCETTI* FUNDAMENTALLY CHANGED PUBLIC EMPLOYEE FREE SPEECH LAW

Historically, public employees possessed no free speech rights on the job. Justice Oliver Wendell Holmes, then with the Massachusetts Supreme Court, captured this reality when he wrote, "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[15] At its core, the Court held that public employees willingly relinquished their free speech rights when they accepted employment with the government.[16]

The U.S. Supreme Court recognized the unfairness of this approach in the 1960s, reasoning that public employees had the right to speak out on matters of public concern or importance.[17] In *Pickering v. Board of Education*, the Court ruled that a public school teacher had a free-speech right to criticize the school board over its allocation of money between academics and athletics.[18] The school board had fired science teacher Marvin Pickering after he wrote a letter to the editor of his local newspaper criticizing the school board's elevation of athletic interests over academics.[19] The Court explained, "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[20]

The Court reasoned that Pickering's letter was a matter of public importance to the community and that his comments did not harm the "close working relationships" he had at the school with his fellow teachers and administrators.[21] In other words, Pickering's speech did not negatively impact his fellow teachers, his students, or the principals. Rather, he criticized only the school board.

Notably, the Court emphasized that public employees are often best positioned to offer keen insight into the operation of public institutions.[22] Marvin Pickering had such insight. As a public-school teacher, he was uniquely situated to understand how the school board spent money

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[15] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892).
[16] *See, e.g.*, United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 99 (1947) ("Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.").
[17] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
[18] *Id.* at 574.
[19] *Id.* at 566.
[20] *Id.* at 568.
[21] *Id.* at 570.
[22] *Id.* at 572.

on academics and athletics. That speech was valuable to his community because taxpayer dollars were potentially mismanaged.

The Court later refined its balancing test in *Connick v. Myers*, a case involving an assistant district attorney who was fired after circulating a questionnaire in his workplace challenging office practices.[23] Even though one of the questions touched on matters of public importance, the Court determined that Myers's questionnaire negatively impacted the operation of the District Attorney's Office.[24] The Court wrote: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[25]

Thus, the Court created a balancing test, known as the "*Pickering-Connick* test," which dominated public employee free speech jurisprudence for decades.[26] Under this approach, the Court first asked whether the employee spoke on a matter of public concern or whether the employee merely engaged in a personal grievance.[27] If the speech was merely a private grievance, then no First Amendment protections attached.[28] Alternatively, if the speech touched on a matter of public concern, the Court balanced the employee's right to engage in such speech against the employer's interest in an efficient, disruption-free workplace.[29]

This standard changed when Los Angeles Assistant District Attorney Richard Ceballos ran afoul of his superiors. Ceballos wrote a memorandum to his bosses recommending dismissal of criminal charges in a case regarding perjured law enforcement testimony.[30] Ceballos believed a sheriff's deputy had given false testimony in a search warrant affidavit.[31] Ceballos wrote the memo and later testified for the defense as to the viability of the warrant.[32] As a result, his superiors stripped him of supervisory duties and transferred him to a less desirable work location.[33]

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[23] 461 U.S. 138 (1983).
[24] *Id.* at 151–52.
[25] *Id.*
[26] Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOCIETY 45, 54 (2007) (noting that the Supreme Court had a balancing test in place for four decades prior to *Garcetti*).
[27] *No Free Speech for You*, *supra* note 14.
[28] *Id.*
[29] *See First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. on the Const. and Civ. Just. of the H. Comm. on the Judiciary*, 115th Cong. 4 (2017) (written testimony of David L. Hudson, Jr., Ombudsman, Newseum Inst. First Amendment Ctr.).
[30] Garcetti v. Ceballos, 547 U.S. 410, 414 (2006).
[31] *Id.*
[32] *Id.* at 414–15.
[33] *Id.* at 415.

Ceballos sued in federal court, alleging his work transfer was retaliation against protected speech. The federal district court ruled in favor of the government, finding Ceballos had no First Amendment protection in his work memo.[34] The Ninth Circuit Court of Appeals reversed, finding that "Ceballos's allegations of wrongdoing in the memorandum constituted protected speech under the First Amendment."[35] The appeals court first noted that Ceballos's speech, contained in the memo, was inherently a matter of public concern.[36] The Ninth Circuit then proceeded to apply the *Pickering-Connick* balancing test and found in favor of Ceballos, noting that his memo did not cause any disruption in the workplace.[37]

The government appealed to the Supreme Court, and the case was actually argued twice before the Court.[38] Initially, the Court appeared sharply divided and, by late Justice John Paul Stevens' account, leaning toward a 5-4 decision in favor of Ceballos.[39] But the Court's composition changed when Justice Samuel A. Alito Jr. replaced retiring Justice Sandra Day O'Connor.[40] Without O'Connor, the Court faced the prospect of a 4-4 split.[41] The Alito-O'Connor change required the Court to hear oral arguments again, and the Court ruled in favor of the District Attorney's Office.[42]

Justice Kennedy, who wrote the majority opinion, noted that the Court should not "constitutionalize the employee grievance."[43] The Court emphasized that Ceballos's job required he write the memo in question.[44] Most importantly, Kennedy created a new threshold categorical rule: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment

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[34] Ceballos v. Garcetti, CV0011106AHMAJWX, 2002 WL 34098285, at *1 (C.D. Cal. Jan. 30, 2002).
[35] Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).
[36] *Garcetti*, 547 U.S. at 416.
[37] *Id.* (citing *Ceballos*, 361 F.3d at 1180).
[38] Jessica Reed, *From* Pickering *to* Ceballos*: The Demise of the Public Employee Free Speech Doctrine*, 11 CUNY L. REV. 95, 97 n.16 (2007).
[39] JUSTICE JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 456 (2019) ("Astute observers of the Court correctly inferred that Sandra had provided the decisive vote for the opposite result in all three before she retired. Otherwise there would have been no need to reargue any of them.").
[40] *See* Lyle Denniston, *Court to Rehear Public Employee Speech Case*, SCOTUSBLOG (Feb. 17, 2006, 12:22 PM), https://www.scotusblog.com/2006/02/court-to-rehear-public-employee-speech-case/ [https://perma.cc/A6BD-SJAA].
[41] *Id.*
[42] *Garcetti*, 547 U.S. at 410.
[43] *Id.* at 420 (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)).
[44] *Id.* at 421.

purposes, and the Constitution does not insulate their communications from employer discipline."[45]

Justice Kennedy also explained that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[46] He emphasized that public employee supervisors must be able to ensure their employees' official communications are "accurate, demonstrate sound judgment, and promote the employer's mission."[47] Kennedy even invoked the constitutional principles of federalism and separation of powers to justify the rule, explaining how "judicial intervention in the conduct of governmental operations" could threaten these seminal constitutional principles.[48]

Three Justices—John Paul Stevens, David Souter, and Stephen Breyer—authored separate dissents. Justice Stevens described the all-or-nothing, wholly citizen speech or entirely employee speech, majority approach as "quite wrong," noting, "it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."[49] In a lengthier dissent, Justice Souter proposed a modified *Pickering-Connick* test.[50] In rejecting the categorical exclusion created by *Garcetti*, Souter argued:

> [P]rivate and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do, public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[51]

For his part, Justice Breyer emphasized that Ceballos, as a prosecutor, had professional obligations to voice his concerns about potentially perjured law enforcement testimony.[52] For Justice Breyer, these "professional and special constitutional obligations" counseled in favor of protecting such employee speech.[53]

Many legal commentators questioned the *Garcetti* decision from the outset.[54] Sheldon Nahmod wrote, "*Garcetti* is unsound as a matter of

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[45] *Id.*
[46] *Id.* at 412.
[47] *Id.* at 422–23.
[48] *Id.* at 423.
[49] *Id.* at 427 (Stevens, J., dissenting).
[50] *Id.* at 427–44 (Souter, J., dissenting).
[51] *Id.* at 428 (Souter, J., dissenting).
[52] *Id.* at 447 (Breyer, J., dissenting).
[53] *Id.*
[54] Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 117 (2008) ("Through its holding, the Court has

First Amendment policy because it under-protects public employee speech that is vital to self-government."[55] Professor Helen Norton, a leading expert on government speech, criticized the *Garcetti* decision, writing: "Lower courts now routinely apply *Garcetti*'s expedited review to dispose of government workers' First Amendment claims at great cost to the public's interest in government transparency, precisely the value that the government speech doctrine supposedly protects."[56]

III. EGREGIOUS EXAMPLES OF PUBLIC EMPLOYEES BEING "GARCETTIZED"

The *Garcetti* decision spread through the defense bar like greased lightning and led to a significant reduction in free speech protections for countless public employees. A few of the notable casualties follow.

A. Speech about Rank Corruption in Law Enforcement Not Protected Speech

Perhaps the starkest example of *Garcetti*'s unfairness concerns former Illinois State Police Officer Michale Callahan, a courageous law enforcement official who faced retaliation after exposing the innocence of two men on death row and the corruption of his superior officers.[57] In the spring of 2000, the Illinois State Police (ISP) received a letter from a private investigator asking the agency to review the 1986 murders of Dyke and Karen Rhoads.[58] The ISP assigned the matter to Lt. Callahan.[59] His investigation uncovered a strong likelihood that the men convicted of the Rhoads' murders—Herbert Whitlock and Randy Steidl—were, in fact, innocent.[60] Callahan and his captain, Steven Fermon, presented their

now made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their career."); Beth Ann Roesler, Garcetti v. Ceballos*: Judicially Muzzling the Voices of Public Sector Employees*, 53 S.D. L. REV. 397, 397 (2008) (noting how *Garcetti* "unduly expanded the powers of the government employer at the expense of its employees and the general public"); Jeffrey W. Stempel, *Tending to Potted Plants: The Professional Identity Vacuum in* Garcetti v. Ceballos, 12 NEV. L.J. 703, 708 (2013) (explaining "*Garcetti* is poorly reasoned as a matter of First Amendment doctrine"); Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 B.Y.U. L. REV. 2175, 2178 (2010) (noting *Garcetti* is "particularly troubling as applied to publicly employed attorney speech").

[55] Sheldon Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 563 (2008).

[56] HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 62 (2019).

[57] Callahan v. Fermon, 526 F.3d 1040, 1042 (7th Cir. 2008).

[58] *Id.*

[59] *Id.*

[60] *Id.*

findings at the ISP Academy, arguing that the governor of Illinois should grant clemency to both Whitlock and Steidl.[61]

Callahan soon became suspicious that Robert Morgan, a person of interest in the initial investigation, was involved in the murders.[62] Callahan also suspected Cpt. Fermon had deliberately compromised the Morgan investigation.[63] After Callahan learned Morgan was under federal investigation for possible drug trafficking and money laundering,[64] he relayed these suspicions to his commander, Diane Carper.[65] Carper ordered him to stop investigating the Rhoads murders.[66]

In April 2003, Callahan filed a complaint with the Department of Internal Investigations (DII), claiming Cpt. Fermon's potential involvement with organized crime had interfered with a federal criminal investigation.[67] The tension between Callahan and his captain became tangible. Around the time Callahan filed his DII complaints, the ISP's Equal Employment Opportunity Office began investigating a hostile-work-environment complaint related to his and Fermon's interactions.[68] Soon after, Carper transferred Callahan to a patrol position in another district.[69]

Callahan sued in federal district court, alleging retaliation for his speech exposing Cpt. Fermon's corruption and for other statements related to the Rhoads investigation.[70] A federal jury awarded Callahan $210,000 in compensatory damages and more than $480,000 in punitive damages.[71] The federal district court judge reduced the punitive damages to $150,000.[72]

The defendants, including Cpt. Fermon, appealed.[73] During the pendency of the appeal, the U.S. Supreme Court decided *Garcetti*.[74] On appeal, the Seventh Circuit applied *Garcetti*'s categorical rule and determined Callahan's speech to the ISP Academy, as well as his criticisms of his superiors, was official job-related speech.[75] The Seventh Circuit noted that lieutenants regularly make formal speeches at the ISP Academy as part

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[61] *Id.* at 1042–43.
[62] *Id.* at 1042.
[63] *Id.* at 1043.
[64] *Id.* at 1042.
[65] *Id.*
[66] *Id.* at 1042–43.
[67] *Id.* at 1043.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Garcetti v. Ceballos, 547 U.S. 410 (2006); *Callahan*, 526 F.3d at 1040 (stating the original case was filed September 23, 2003).
[75] *Callahan*, 526 F.3d at 1045.

of their job duties.[76] The appeals court also found Callahan "spoke pursuant to his official duties when he twice complained to the DII about Cpt. Fermon and Cdr. Carter."[77] The Seventh Circuit noted that ISP rules require officers to report incidents of misconduct by fellow officers.[78]

In his memoir, Callahan railed against the unfairness of the *Garcetti* ruling, stating, "How ludicrous, I always thought I was a citizen when I spoke up, and I certainly didn't realize that once I put my gun and badge on, I stopped being a citizen[.]"[79] He also noted that several members of his federal jury called his lawyer to complain about the inequity of the Seventh Circuit's decision and the political corruption endured by Callahan.[80]

B. Revealing a Leak in Law Enforcement Leads to Punishment Not Praise

Like Callahan, Martin Sigsworth knows full well the phenomenon of being "Garcettized" after revealing corruption in law enforcement. Sigsworth, an investigator for the Aurora, Illinois Police Department, worked on a multi-jurisdictional task force designed to address gang activity in the area.[81] Joining the department in 1992, Sigsworth later began working with federal agencies to combat gang and drug activity in Aurora.[82] In 2002, the task force obtained numerous arrest warrants for suspected drug dealers and gang leaders.[83]

Before the task force could move on the stash houses associated with the targets, some of the task force seemingly gave the targets notice of the impending raid.[84] As a result, several key individuals evaded arrest.[85] Sigsworth reported to his Chief of Police that several task force members likely committed misconduct that led to the botched raid.[86] Shortly thereafter, the department removed Sigsworth from the task force and the resulting investigation.[87]

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[76] *Id.* (noting lieutenants were regularly required to attend meetings and exchange information at the Academy and that Callahan was required to appear during business hours and report on activities he had been paid to perform).
[77] *Id.*
[78] *Id.*
[79] CALLAHAN, *supra* note 2, at 355.
[80] *Id.* at 356.
[81] Sigsworth v. City of Aurora, 487 F.3d 506, 507 (7th Cir. 2007).
[82] *Id.* at 508 (stating that Sigsworth began work on the task force in 1998).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

Sigsworth filed a federal lawsuit, alleging retaliation based on his protected speech regarding possible corruption in the task force.[88] A federal district court ruled in favor of the city, finding that Sigsworth spoke as an employee rather than as a citizen.[89] On appeal, the Seventh Circuit affirmed the lower court's ruling against Sigsworth.[90]

On appeal, Sigsworth argued that his speech should be protected because it "constituted matters of the utmost concern to the public."[91] However, the Seventh Circuit again relied on the categorical rule in *Garcetti*, effectively barring Sigsworth's claim.[92] The appeals court wrote: "Sigsworth was not speaking as a citizen when he reported to his superiors his suspicions of misconduct by his colleagues."[93] The Seventh Circuit conceded Sigsworth did what any member of the task force should have done when he discovered his colleague's misconduct—that is, he reported the wrongdoing.[94] However, the court concluded, "Sigsworth's report to his supervisors of the suspected misconduct was part of his official duties as an investigator and member of the task force and, therefore, outside the scope of First Amendment protection."[95]

C. Fire Chief's Revelations about Inadequate Staffing Lead to Termination

The tale of Charles D. Foley, Jr. offers another egregious example of a public servant who spoke the truth and paid the price following *Garcetti*.[96] Foley served as Chief of the Fire Department for Randolph, Massachusetts.[97] In May 2007, the fire department responded to a fire at a single-family residence in the town.[98] "[T]wo children, ages seventeen and ten, [perished in the fire, as they] were trapped in a second floor bedroom."[99]

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[88] *Id.*
[89] *Id.*
[90] *Id.* at 512.
[91] *Id.* at 509.
[92] *Id.*
[93] *Id.* at 510.
[94] *Id.* at 511 ("Sigsworth's allegations indicate that in reporting his suspicions, he was merely doing what was expected of him as a member of the task force.").
[95] *Id.* at 512.
[96] Foley v. Town of Randolph, 598 F.3d 1, 9 (1st Cir. 2010) (holding that the chief "was speaking in his official capacity and not as a citizen" when he made the statements, and the statements were therefore not protected by the First Amendment).
[97] *Id.* at 2.
[98] *Id.*
[99] *Id.*

At the scene of the fatal fire, Foley, the state fire marshal, and another employee from the fire marshal's office spoke to the media.[100] Foley was in uniform at the time of his press conference, and he "spoke about the details of the fire," but also mentioned concerns about insufficient funding and personnel at the fire department.[101] He indicated that allowing more manpower would have made the firefighting process "more professional[] and more according to standard."[102] He also stated: "I've been asking to replace the fire fighters here in the Town over the last five years and it seems to have fallen on deaf ears."[103] Further, Foley told the press: "As many of you are here today, you have the resources to bring this information to the public."[104]

Town leaders who were upset that Foley spoke candidly to the media[105] brought disciplinary charges against him, claiming he used poor judgment in speaking to the press about alleged deficiencies in fire protection services.[106] During these proceedings, a town-appointed hearing officer determined Foley made "inappropriate, inaccurate, intemperate, and misleading statements to the news media" and recommended a fifteen-day suspension, which the Town's Board of Selectmen upheld.[107]

Foley filed a lawsuit in federal district court, alleging a violation of his First Amendment rights and several state law claims based on his use of protected speech.[108] The court noted that Foley's employment contract neither authorized nor required he make public statements as part of his job duties but added that "nothing in the contract or the statute prohibited Foley from doing so."[109] Proceeding along these lines, the federal district court found that the statements were "made pursuant to [Foley]'s official job duties" and granted summary judgment in the town's favor.[110] On appeal, the First Circuit affirmed.[111] In so doing, the court held that the issue of whether or not Foley was required to speak to the media as part of his official duties was not dispositive in the matter.[112] Rather, the court of appeals

[100] *Id.*
[101] *Id.* at 2–3.
[102] *Id.* at 3.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 3–4.
[106] *Id.* at 3.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Foley v. Town of Randolph, 601 F. Supp. 2d 379, 388 (D. Mass. 2009).
[111] *Foley*, 598 F.3d at 1.
[112] *Id.* at 6.

emphasized how Foley chose to speak to the news media while he was on duty and in uniform.[113]

The appeals court explained: "As Chief, he had been in command of the scene, and when choosing to speak to the press, he would naturally be regarded as the public face of the Department when speaking about matters involving the Department."[114] The First Circuit decision emphasized that there was no relevant citizen analogue to his speech.[115] Rather, he spoke as the fire chief at a forum that he had access to solely because of his position.[116] The court noted "the subject of Foley's speech was entirely related to matters concerning the Fire Department,"[117] and added, "there could be no doubt that Foley was speaking in his official capacity and not as a citizen."[118] Finally, the First Circuit concluded: "We hold that when the circumstances surrounding a government employee's speech indicate that the employee is speaking in his official capacity, *Garcetti* dictates that we strike the balance in favor of the government employer."[119]

D. Teacher's Warning of Scabies Outbreak Not Protected Speech

Yvonne Massaro, an art teacher at Edward Murrow High School in New York City, was also "Garcettized."[120] In December 2005, Massaro informed school officials that she had contracted scabies, which she believed was caused by the unsanitary conditions in her classroom.[121] She submitted several documents to the New York Department of Education, including an injury report and an accident report.[122] The injury report revealed that she had been bitten by mites in her classroom.[123] The report also revealed what Massaro called "an unclean working environment."[124] Additionally, she expressed concern about the school's failure to clean her classroom or move her to a different classroom.[125] Massaro complained about these issues several times to school administrators.[126]

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[113] *Id.* at 7.
[114] *Id.*
[115] *Id.* at 7.
[116] *Id.*
[117] *Id.* at 8.
[118] *Id.* at 9.
[119] *Id.* at 9–10.
[120] *See* Massaro v. New York City Dep't of Educ., 481 F. App'x 653 (2nd Cir. 2012).
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*

After her complaints, Massaro alleged school officials changed her schedule unfavorably and canceled one of her classes.[127] She filed a federal lawsuit, contending officials retaliated against her for her use of protected speech.[128] A federal district court granted summary judgment to the Department of Education, reasoning that Massaro spoke as an employee, rather than as a citizen, when she made the complaints.[129]

On appeal, a three-judge panel of the Second Circuit Court of Appeals affirmed.[130] The Second Circuit held that Massaro made her statements "as a public school teacher" within the meaning of the *Garcetti* standard.[131] The appeals court concluded: "We have no difficulty in concluding on this record that Massaro spoke as an employee—not as a private citizen."[132]

E. Teacher's Complaints of Falsifying Test Results Not Protected Speech

Another public school teacher learned of *Garcetti*'s long reach when he contested his termination on First Amendment grounds.[133] Bruno Mpoy, a special education teacher at Ludlow Elementary School with the Washington D.C. Teaching Fellows, alleged the school's principal, Donald Presswood, instructed him to falsify his students' test results.[134] Mpoy further claimed that when he refused to falsify the test scores, Presswood enlisted other teachers to do so.[135] Mpoy sent a letter to Michelle Rhee, Chancellor of the Washington D.C. School District, complaining about a lack of classroom supplies, inadequate classroom facilities, lack of teaching assistants, and the order from Principal Presswood to falsify test scores.[136] Two months later, Mpoy was terminated.[137]

Mpoy sued in federal court, alleging retaliation for speech protected by the First Amendment.[138] The federal district court determined Mpoy's complaints were "'part-and-parcel' of his concerns as a school teacher," noting that the vast majority of the complaints related directly to Mpoy's classroom.[139] Mpoy contended he spoke as a public citizen when he

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[127] *Id.* at 654.
[128] *Id.*
[129] *Id.* at 654–56.
[130] *Id.* at 656.
[131] *Id.*
[132] *Id.*
[133] Mpoy v. Fenty, 901 F. Supp. 2d 144, 147 (D.D.C. 2012).
[134] *Id.*
[135] *Id.*
[136] *Id.* at 148.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 154–55.

raised the issue of the falsification of test scores.[140] However, the federal district court reasoned that Mpoy's complaints related to his responsibilities as a public school teacher and noted that Mpoy raised his complaints up the "chain of command" rather than outside it.[141] The court concluded: "Although the Court is not unsympathetic to what Plaintiff alleges occurred here—indeed, his allegations are quite troubling, particularly in the realm of falsification of test scores—it nonetheless cannot find that [Mpoy] has alleged a violation of the First Amendment."[142]

F. Custodian's Warning about Asbestos Not Protected Speech

Another *Garcetti* victim was a New York-based custodian who was fired after complaining about possible asbestos contamination at a public high school.[143] Norman Morey worked for the Somers County School District for twenty years until his termination, with nine of those years spent as head custodian.[144] "In May 2003, Morey received a phone call that there was a mess in the high school gymnasium" where he found "[g]rayish-white chunks and larger pieces of insulation . . . [that had] fallen from the ceiling."[145]

Morey informed the Superintendent of Buildings and Transportation that the fallen material could contain asbestos and expressed his view about closing the gym pending a thorough evaluation.[146] The Superintendent told Morey to simply tape up the loose insulation.[147] Morey was told "not to be a troublemaker" and that "the administration ha[d] ways of dealing with troublemakers."[148] Later, administrators terminated Morey for allegedly submitting inaccurate timesheets and verbally abusing custodial staff.[149] Morey sued, contending administrators terminated him in retaliation for his warnings about possible asbestos contamination at the high school.[150]

A federal district court judge dismissed Morey's lawsuit based on *Garcetti*.[151] The judge determined that the core duties of Morey's job related to maintaining school buildings and grounds and concluded: "[I]t was clear that Morey was acting in furtherance of his core duty when he asserted that

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[140] *Id.* at 157.
[141] *Id.*
[142] *Id.*
[143] Morey v. Somers Cent. Sch. Dist., No. 06 Civ. 1877, 2010 WL 1047622, at *1 (S.D.N.Y. Mar. 19, 2010).
[144] *Id.*
[145] *Id.* (internal quotation marks and citations omitted).
[146] *Id.* at *1–2.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at *3.
[151] *Id.* at *8.

the fallen insulation materials in the gymnasium might contain asbestos and that the area should be tested to resolve the issue."[152]

These decisions are troubling and should alarm reasonable people who care about government transparency, the rule of law, and fundamental fairness. A law enforcement official who exposes corruption and a cover-up with regard to a cold case should not face retaliation like Michale Callahan.[153] A police officer who reveals a leak in a multi-jurisdictional task force like Martin Sigsworth should be commended, not chastised and relocated.[154] The public deserves to hear that a fire department may be underfunded and understaffed, as Charles Foley told his community in Randolph, Massachusetts.[155] Quite simply, the public benefits from learning about problems in places of public employment because these places of employment often serve significant functions for society at large. It makes little sense to deprive the public of its best sources of information – that is, the employees who actually witness problems firsthand.

IV. SLIGHT EXCEPTIONS TO *GARCETTI*

There have been two slight retreats from *Garcetti* in recent years.[156] The first deals with First Amendment protection for public employees punished for truthful, in-court testimony when such testimony is not a regular aspect of their job duties.[157] The second addresses some lower courts' recognition that *Garcetti* should not apply with full force in university settings.[158]

A. Protecting Truthful Testimony in Court

The Supreme Court provided a small, welcome relief from *Garcetti* for public employees who do not normally testify in court but who have been punished for providing truthful sworn testimony under oath in *Lane*

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[152] *Id.* at *7.

[153] *See* Callahan v. Fermon, 526 F.3d 1040, 1040 (7th Cir. 2008) (concluding that a police officer's statements are not protected by the first amendment when made at a meeting about a cold case, and Plaintiff was transferred laterally to another district). *But see* Fulk v. Vill. of Sandoval, No. 08-843-GPM, 2010 WL 1132560, at *4 (S.D. Ill. Mar. 19, 2010) (stating that because sufficient evidence existed relating to police officer's off duty reports of suspected misconduct, the reports were protected under the first amendment).

[154] *See* Sigsworth v. City of Aurora, 487 F.3d 506 (7th Cir. 2007) (holding that the First Amendment does not protect a police detective's speech to supervisors).

[155] Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010).

[156] *See, e.g.*, Lane v. Franks, 573 U.S. 228 (2014).

[157] *See id.* at 231.

[158] *See* Adams v. Tr. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 553 (4th Cir. 2011); Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).

v. Franks.[159] Edward Lane was the director of Community Intensive Training for Youth (CITY) and was employed by Central Alabama Community College (CACC).[160] Lane conducted an audit in response to CITY's financial difficulties and uncovered that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had failed to report to her CITY office.[161]

Lane fired Schmitz after she refused to show up at her CITY office, and the Federal Bureau of Investigation initiated an investigation into her employment with CITY.[162] Lane later testified before a federal grand jury about his decision to fire Schmitz.[163] In January 2008, the grand jury indicted Schmitz on four counts of mail fraud and four counts of theft.[164] Later, at Schmitz's trial, Lane testified under subpoena as to the events that led to Schmitz's termination.[165] The jury failed to reach a verdict.[166]

Six months later, federal prosecutors re-tried Schmitz, and Lane testified again.[167] This time, the jury convicted Schmitz of three counts of mail fraud and four counts of theft.[168] Steve Franks, who became president of CACC, later terminated Lane.[169] Lane sued in federal court, contending his termination resulted from his truthful courtroom testimony in the Schmitz matter.[170] A federal district court granted summary judgment to Franks based on qualified immunity and *Garcetti*.[171] Relying extensively on *Garcetti*, the Eleventh Circuit affirmed, finding no violation of clearly established law because Lane's testimony related to his official job duties within the meaning of *Garcetti*.[172]

After granting certiorari, the Supreme Court reversed, writing "[t]truthful testimony by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes."[173] The Court also explained, "Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[174] The Court distinguished *Lane* from *Garcetti*, noting that

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[159] *Lane*, 573 U.S. at 231.
[160] *Id.*
[161] *Id.* at 232.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 233.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at 234.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 238.
[174] *Id.*

Lane's in-court testimony was different from an internal memorandum prepared by a deputy district attorney for his office.[175] Furthermore, the Court emphasized that the key question under *Garcetti* is whether the speech in question is "ordinarily within the scope of an employee's duties."[176]

While the Court's decision in *Lane v. Franks* is narrow and arguably does not apply to public employees who regularly testify in court as part of their jobs, the decision is still significant because it represents a slight retreat from *Garcetti*.[177] The decision also reiterates the point Justice Thurgood Marshall made so forcefully in *Pickering*—that "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[178]

B. Garcetti in the University Setting

In *Garcetti*, Justices Kennedy and Souter sparred over whether the majority's holding of no First Amendment protection for official, job-related speech would apply to the expression of university professors and academic professionals.[179] In his dissent, Souter warned that the holding would imperil university professors' speech and academic freedom.[180] Souter noted the Supreme Court once referred to academic freedom as a "transcendent value to all of us"[181] and that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[182]

Kennedy responded to Souter's warnings, noting "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[183] However, Kennedy ultimately sidestepped the question as to whether the holding applies "in the same manner to a case involving speech related to scholarship or teaching."[184]

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[175] *Id.* at 239.
[176] *Id.* at 240.
[177] David L. Hudson, Jr., *Court Limits* Garcetti *– at Least a Little*, FREEDOM F. INST. (July 8, 2014), https://www.freedomforuminstitute.org/2014/07/08/court-limits-garcetti-at-least-a-little/ [https://perma.cc/X3KW-MFF5].
[178] *Lane*, 573 U.S. at 240.
[179] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[180] *Id.* at 438 (J. Souter, dissenting).
[181] *Id.* at 439 (J. Souter, dissenting) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
[182] *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
[183] *Id.* at 425 (majority opinion).
[184] *Id.*

Only two federal appellate circuits, the Fourth and the Ninth, have ruled *Garcetti* does not apply in university settings.[185] The Fourth Circuit first rejected *Garcetti* in the university setting in the case of Michael Adams, an associate professor of criminology at the University of North Carolina Wilmington.[186] Adams alleged university officials denied him a promotion to full professor because of the conservative Christian viewpoints reflected in his columns and books.[187] A federal district court denied his claims, in part based on *Garcetti*.[188] On appeal, the Fourth Circuit reinstated Adams's First Amendment claims.[189] The court explained: "We are also persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case" because doing so "could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment."[190]

The Ninth Circuit also rejected the use of *Garcetti* in an academic setting in the case of David Demers, a tenured associate professor at Washington State University.[191] Demers claimed university officials retaliated against him by lowering his evaluation scores because of a pamphlet called "The 7 Step Plan" and his book entitled *The Ivory Tower of Babel*.[192]

A federal district court granted summary judgment to the university administrators.[193] On appeal, the Ninth Circuit reversed, noting "Demers presents the kind of case that worried Justice Souter."[194] The Ninth Circuit determined "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."[195]

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[185] *See* David L. Hudson, Jr., *Are Free Speech and Academic Freedom Under Assault at Colleges and Universities?* AM. BAR ASS'N J. (Oct. 1, 2018), http://www.abajournal.com/magazine/article/free_speech_academic_freedom_buchanan [https://perma.cc/VS5V-ETWV].

[186] Adams v. Tr. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011).

[187] *Id.* at 557.

[188] *Id.* at 561 (explaining the district court held Adams's listing of his written work and public appearances in a promotional application was speech made pursuant to his official duties and therefore not protected by the First Amendment).

[189] *Id.* at 562 (finding the district court's conclusion that Adams's speech was converted from protected to unprotected to be erroneous).

[190] *Id.* at 562–64.

[191] Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014).

[192] *Id.* at 406–08. Both the book, a draft of which was attached to Demers's 2007 sabbatical application, and the pamphlet, which Demers distributed widely, were critical of Washington State University administrators. *Id.*

[193] *Id.* at 409 (holding that Demers's publications were written and distributed as part of his official duties as faculty member, and, therefore, were not protected speech).

[194] *Id.* at 411.

[195] *Id.* at 412.

Instead, the Ninth Circuit held that cases involving academic freedom and scholarship at the university level are best resolved using the traditional *Pickering-Connick* balancing test.[196]

Other circuits have not embraced this approach.[197] For example, the Second Circuit recently ruled *Garcetti* foreclosed First Amendment claims brought by a university adjunct professor who alleged he was not re-hired after he reported students cheating.[198]

Hopefully, the Supreme Court will clarify that *Garcetti* does not apply to teaching and scholarship at some point.[199] Academic freedom, scholarship, and teaching need the freedom to flourish.[200] Workplace efficiency should not trump the ability of university professors to conduct inquiry and question societal trends.

V. CONCLUSION

The decision in *Garcetti v. Ceballos* has had tragic results for countless public employees across the country.[201] It also represents a significant "blot" on the First Amendment record of Justice Anthony Kennedy.[202] As a direct result of *Garcetti*, many public employees keep their mouths shut for fear of losing their jobs. The losers are not just individual employees who get "Garcettized." Rather it is the public at large, which is deprived of important information pertaining to their tax dollars and the administration of public programs, that is harmed. *Garcetti* understates the importance of public employees' speech to the public discourse writ large and fails to consider the public's First Amendment rights to information about the functioning of their public institutions. Garcetti causes palpable

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[196] *Id.*

[197] *Id.*

[198] *See* David L. Hudson, Jr., *No First Amendment Protection for Professor Who Spoke Out Against Cheating Students*, FREEDOM F. INST. (Oct. 24, 2017), https://www.freedomforuminstitute.org/2017/10/24/court-rules-no-first-amendment-protection-for-professor-who-spoke-out-about-cheating-students/ [https://perma.cc/8DTG-73TE].

[199] David L. Hudson, Jr., *Academic Freedom for Public University Professors: Unsettled Questions in the Wake of* Garcetti v. Ceballos, FREEDOM F. INST. (Apr. 26, 2017), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-and-government-employees-overview/academic-freedom-for-public-university-professors-unsettled-questions-in-the-wake-of-garcetti-v-ceballos/ [https://perma.cc/4ENS-MJLV].

[200] Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-*Garcetti *World*, 37 SEATTLE L. REV. 1, 20 (2013).

[201] 547 U.S. 410 (2006); Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 726 (2011).

[202] David L. Hudson, Jr., *Justice Kennedy and the First Amendment*, 9 HOUS. L. REV.: OFF THE REC. 49, 58 (2018).

harm not just to the individual employees, whose free-speech rights it squelches, but to the interested public as well.[203]

The Supreme Court made a major misstep by erecting such a broad, categorical rule in *Garcetti v. Ceballos*. The decision is a "jurisprudential disaster,"[204] and one of the worst decisions rendered by the Court in recent memory. It unnecessarily and needlessly reduces and disrespects the free-speech rights of tens of millions of people.

[203] *No Free Speech for You*, *supra* note 14.
[204] *Id.*